

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1373-CR

Cir. Ct. No. 2015CF492

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Andrew Carter appeals a judgment of conviction entered after a jury found him guilty of six crimes. The issue he presents is

whether the circuit court properly denied his motion to suppress evidence. We affirm.

BACKGROUND

¶2 The State charged Carter with three counts of burglary and three counts of bail jumping after police conducted a traffic stop and found stolen items in the vehicle he was driving. He moved to suppress the evidence found incident to the stop.

¶3 Two City of Milwaukee police officers, Karlee Kennon and Thomas Ozelie, were the only witnesses who testified at the suppression hearing. Both officers described responding to a 911 call made on January 25, 2015, at 10:08 p.m. The caller reported the burglary of a home in the 5100 block of West Washington Boulevard, part of an area that Ozelie said was experiencing “a lot of burglaries, auto thefts, [and] thefts from vehicles.”

¶4 Kennon testified that she arrived at the residence at approximately 10:15 p.m., and Ozelie testified that he arrived at approximately 10:24 p.m. Upon arriving, the officers spoke to B.M., who said that his home had just been burglarized and that the stolen items included his four iPhones.

¶5 Both officers described how Kennon helped B.M. use her personal iPhone to activate the “Find My iPhone” application, which relies on GPS signals to track the position of an iPhone. Ozelie told the circuit court that he had previously used the iPhone tracking application and found on multiple occasions that it reliably revealed the location of a missing iPhone.

¶6 Ozelie testified that at 10:31 p.m., he observed that the GPS signal from the tracking application indicated that B.M.’s iPhones were only two blocks

away from the burgled residence, “smack dab” in the middle of an alley bordered by High Mount Boulevard to the west, 49th Street to the east, West Vine Street to the north, and West Washington Boulevard to the south. He explained that the alley itself runs north and south, has no exit point at the south end, and opens at the north end onto Vine Street.

¶7 After noting the location of B.M.’s iPhones as indicated by the tracking application, Ozelie drove his squad car to High Mount Boulevard and parked in a place where he had a view of the mouth of the alley opening onto Vine Street. At 10:32 p.m., Ozelie saw a Buick LeSabre drive very slowly out of the alley, cross Vine Street, and continue north into a second alley that runs between North 49th Street and North High Mount Boulevard.

¶8 Ozelie testified that the Buick aroused his suspicions for a variety of reasons. First, it was “within a few hundred feet” of where the GPS tracking system had indicated the iPhones were located just seventy-five seconds earlier. Second, the Buick was the only traffic in the immediate area; no other cars were in the alley, and no pedestrians were present. Third, Ozelie testified that the hour was late and the Buick’s path was “very unusual.” He said that he had been patrolling in this section of Milwaukee for his entire nine-year law enforcement career and, in his experience, the alley from which the Buick emerged is used by residents and guests “that live on that specific block.... Anybody that’s coming out of the alley would be traveling east or west to get on one of the main streets to travel where they are going,” not heading north into another alley. Finally, Ozelie testified that the Buick’s speed was unusually slow. In his opinion, the Buick’s route and slow speed suggested the driver was “not traveling anywhere with a purpose.”

¶9 Based on the foregoing, Ozelie conducted an investigative stop of the Buick. Carter was the driver. Within a few minutes of the stop, Kennon arrived and activated a function of the Find My iPhone application that generates a ringing sound from a missing iPhone. When Kennon activated the function, the officers heard ringing coming from the Buick.

¶10 At the conclusion of the testimony, the circuit court found that Ozelie was credible and that both officers “did a good job articulating the facts” preceding the investigative stop. The circuit court concluded that the totality of the circumstances described by the officers established reasonable suspicion warranting an investigative stop of the Buick. The circuit court therefore denied the motion to suppress the evidence found pursuant to the stop.

¶11 The case proceeded to trial, and a jury convicted Carter of all the charges he faced. He appeals.

ANALYSIS

¶12 Carter asserts that the police lacked a justifiable reason for stopping him and that the circuit court therefore should have suppressed the evidence found pursuant to the stop. “The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures.” *State v. Artic*, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. The Fourth Amendment is not offended, however, when police conduct an investigatory stop and detain a person based on “reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is or was violating the law.” *See State v. Colstad*, 2003 WI App 25, ¶¶7-8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation and brackets

omitted). The standard is the same under the Wisconsin Constitution. *State v. Young*, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997).

¶13 When we consider a challenge to a suppression order, our review involves a two-step process. See *State v. Pender*, 2008 WI App 47, ¶8, 308 Wis. 2d 428, 748 N.W.2d 417. First, we consider the circuit court’s findings of historical fact, and we uphold those findings unless they are clearly erroneous. See *State v. Harris*, 206 Wis. 2d 243, 249-50, 557 N.W.2d 245 (1996). In reviewing the findings, we defer to “the superior opportunity of the [circuit] court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.” See *State v. Searcy*, 2006 WI App 8, ¶35, 288 Wis. 2d 804, 709 N.W.2d 497 (citation omitted). Whether the facts found by the circuit court require suppression is a question of law. See *Pender*, 308 Wis. 2d 428, ¶8. We review that question without deference to the circuit court. *Id.*

¶14 Carter does not challenge the factual findings or the credibility assessments of the circuit court. Rather, he contends that the facts described by the officers did not support a reasonable suspicion permitting the police to stop him. Thus, our task is to apply undisputed facts to constitutional standards. See *State v. Rutzinski*, 2001 WI 22, ¶12, 241 Wis. 2d 729, 623 N.W.2d 516.

¶15 Reasonable suspicion is determined under a familiar, “common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” See *Young*, 212 Wis. 2d at 424. Although acts and circumstances viewed in isolation might be lawful behavior, the totality of the circumstances as a whole may support a reasonable suspicion. See *State v. Popke*, 2009 WI 37, ¶25, 317 Wis. 2d 118, 765 N.W.2d 569.

¶16 In this case, police officers using a GPS tracking application determined that two iPhones reported stolen less than a half-hour earlier were in the middle of a dead-end alley approximately two blocks away from the victim's home. Within two minutes of obtaining this information, Ozelie observed a Buick LeSabre emerge from the mouth of that alley. Carter does not dispute the reliability of the information gathered from the GPS tracking application, but he contends the information was insufficient to allow a conclusion that the stolen property was in the Buick and thus was insufficient to justify an investigative stop. The GPS tracking information, however, was not the entirety of the relevant facts and circumstances supporting Ozelie's actions.

¶17 In assessing the reasonableness of an investigative stop conducted soon after the commission of a crime, relevant considerations include “the size of the area in which the offender might be found ... [and] the number of persons about in that area.” See *State v. Guzy*, 139 Wis. 2d 663, 676-77, 407 N.W.2d 548 (1987) (citation omitted). Here, the information that Ozelie obtained from the GPS tracking application suggested that the size of the relevant area was limited to an alley and its immediately surrounding streets. Significantly, no pedestrian traffic and no motor vehicles other than Carter's Buick LeSabre were present when Ozelie staked out the alley minutes after obtaining the location information.

¶18 The training and experience of the investigating officers are relevant in assessing the reasonableness of an investigative stop, see *State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999), as are a suspect's unusual and ambiguous behaviors, see *State v. Waldner*, 206 Wis. 2d 51, 60-61, 556 N.W.2d 681 (1996). In this case, Ozelie testified that he had spent nearly a decade patrolling the area of Milwaukee where he conducted the traffic stop. He told the circuit court that, based on his observations of individuals who use the alleys, the

Buick's path was highly unusual. Moreover, he observed that the Buick was moving "very slowly," which, coupled with its atypical route, attracted his attention because the driver appeared to be cruising aimlessly.

¶19 Additionally, the reputation of an area and the time of day may properly contribute to an officer's reasonable suspicion. *See Allen*, 226 Wis. 2d at 74-75. Here, the hour was late and the Buick was in an area that Ozelie testified was experiencing a rash of burglaries, car thefts, and other property crimes.

¶20 Carter points out that Ozelie did not observe any unlawful action before stopping the Buick, and Carter offers various innocent explanations for the behavior that aroused the officer's suspicions. These arguments are not persuasive. An officer who observes an unlawful action need not conduct an investigative stop because the unlawful action gives the officer probable cause to arrest. *See Waldner*, 206 Wis. 2d at 59. "The law of investigative stops allow[s] police officers to stop a person when they have less than probable cause. Moreover, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Id.*

¶21 We also reject Carter's suggestion that this case is controlled by *State v. Washington*, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305. There, police stopped a pedestrian on a city street during the mid-afternoon based on information from an unidentified person who complained about loitering and drug dealing in the area at an unspecified time. *See id.*, ¶¶2, 7. The *Washington* court concluded that the pedestrian's presence did not warrant a stop, notwithstanding the officer's knowledge that the pedestrian had previously been arrested for drug dealing. *See id.*, ¶¶7, 17. The court explained that a vague

complaint about loitering did not warrant stopping a person who was walking down the street. *See id.*, ¶17.

¶22 In Carter’s case, however, police were investigating a recent burglary with an identified victim who had reported the loss of known items. Officers had reason to believe that the items had been transported to a specific dead-end alley. Within moments of identifying the likely location of the stolen property, Ozelie observed a single vehicle, alone on the road, emerge from that very alley and drive an unusual route at an unusual speed. The totality of the circumstances gave rise to a reasonable suspicion that the Buick was or had been involved in criminal activity. Accordingly, the stop was lawful.

By the Court.— Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

